Supreme Court, U.S.
FILED

97 779 NOV - 6 1997

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1997

FRIENDS OF THE VIETNAM VETERANS MEMORIAL; WARRIORS INCORPORATED; LAST FIREBASE ARCHIVES PROJECT; AMERICANS FOR FREEDOM ALWAYS; GAUDIYA VAISHNAVA SOCIETY; ONE WORLD ONE FAMILY NOW, INC.; OPEN ART, INC.,

Petitioners,

v.

ROBERT STANTON, Director, National Park Service; TERRY CARLSTROM, Regional Director, National Capital Region; ROBERT E. LANGSTON, Chief, United States Park Police,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF DAVID M. LIBERMAN
DAVID M. LIBERMAN
Counsel of Record
1888 Century Park East, Suite 1750
Los Angeles, California 90067
(310) 277-9288

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the sale of message-bearing merchandise that is inextricably intertwined with other forms of protected expression, such as literature distribution and oral advocacy, may be "parceled out" and prohibited.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6. Robert Stanton and Terry Carlstrom, the current Director of the National Park Service and Regional Director of the National Capital Area respectively, are substituted for Roger G. Kennedy and Robert G. Stanton, defendants in the case below and the holders of those offices at the time the case was filed, pursuant to S. Ct. R. 35.3.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 8

I. THE DECISION BY THE COURT OF APPEALS HAS ACCENTUATED A CLEAR-CUT CONFLICT IN THE COURTS OF APPEALS AND LOWER FEDERAL COURTS AS TO THE APPROPRIATE APPLICATION OF SALES REGULATIONS TO PROTECTED EXPRESSION 9

II. IN UPHOLDING THE CONSTITUTIONALITY OF THE SALES BAN, THE COURT OF APPEALS IMPROPERLY DENIGRATED THE PROTECTED STATUS OF PETITIONERS' FUNDRAISING ACTIVITIES, WHICH IT "PARCELED OUT" FOR PROSCRIPTION 14

III. THE COURT OF APPEALS' DECISION DISREGARDS NUMEROUS AND OBVIOUSLY LESS BURDENSOME ALTERNATIVES TO A COMPLETE BAN ON NONCOMMERCIAL SALES 19

TABLE OF CONTENTS – Continued

Page

IV. SECTION 7.96(k)(2) DOES NOT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION 21

CONCLUSION 24

APPENDIX .....App. 1

A. Court of Appeals' Decision .....App. 1

B. Court of Appeals' Judgment .....App. 10

C. District Court Memorandum Opinion .....App. 12

D. District Court Order .....App. 32

E. Order Denying Petition For Rehearing .....App. 34

F. Order Denying Suggestion For Rehearing En Banc .....App. 35

G. Order Denying Motion for Stay of Mandate .....App. 36

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 13

Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993) 20

Ayres v. City of Chicago, 966 F. Supp. 701 (N.D. Ill. 1997), *aff'd*, 1997 WL 563220 (7th Cir. Sept. 4, 1997) 18, 22

Ayres v. City of Chicago, No. 97-2373, 1997 WL 563220 (7th Cir. Sept. 4, 1997) 12, 13

Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997) 12, 13, 20, 23

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 19, 20

Buckley v. Valeo, 424 U.S. 1 (1976) 15, 18

Cantwell v. Connecticut, 310 U.S. 296 (1940) 8

Cardtoons v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996) 17

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 19

City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) 21

Community for Creative Non-Violence v. Turner, 893 F.2d 1387 (D.C. Cir. 1990) 21

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 18, 22

TABLE OF AUTHORITIES – Continued

Page

Gaudiya Vaishnava Soc'y v. City and County of San Francisco, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992) 9, 10

Hague v. CIO, 307 U.S. 496 (1939) 9

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) 23

International Soc'y for Krishna Consciousness, Inc. v. San Diego Unified Port Dist., No. 91-1768-B (LSP) (S.D. Cal. Dec. 10, 1992) 11

ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949 (D.C. Cir. 1995) 12

Jamison v. Texas, 318 U.S. 413 (1943) 14

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 23

Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993) 20

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 14, 15

One World One Family Now v. City & County of Honolulu, 76 F.3d 1009 (9th Cir.), *cert. denied*, 117 S. Ct. 554 (1996) 11, 12

One World One Family Now v. Nevada, 860 F. Supp. 1457 (D. Nev. 1994) 10

One World One Family Now v. City of Key West, 852 F. Supp. 1005 (S.D. Fla. 1994) 10

Perry v. Los Angeles Police Dep't, 121 F.3d 1365 (9th Cir. 1997) 19

Project 80's, Inc. v. City of Pocatello, 942 F.2d 635 (9th Cir. 1991) 19

TABLE OF AUTHORITIES – Continued

Page

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 17

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) 16, 17

United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) 17

Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 10, 16, 17, 21

Ward v. Rock Against Racism, 491 U.S. 781 (1989) ..9, 19

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

36 C.F.R. § 7.96(k)(1)(2)(1996) 2

36 C.F.R. § 7.96(k)(2) ..... *passim*

60 Fed. Reg. 17,639 (Apr. 7, 1995) 6, 7

OTHER AUTHORITIES

Richard Longstreth, *Introduction: Change and Continuity on the Mall, in The Mall in Washington 1791-1991*, 11 (Richard Longstreth ed., 1991) 5

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Friends of the Vietnam Veterans Memorial, Americans for Freedom Always, Warriors Incorporated, The Last Firebase Archives Project, Gaudiya Vaishnava Society, One World One Family Now, Inc., and Open Art, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 116 F.3d 495. The opinion and order of the district court, App. 12, is reported at 899 F. Supp. 690.

JURISDICTION

The judgment of the court of appeals was entered June 6, 1997. App. 10. A petition for rehearing was denied on August 8, 1997, App. 34, as was a suggestion for rehearing en banc. App. 35. Petitioners' Motion for Stay of Mandate was denied on September 2, 1997. App. 36. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law- . . . abridging the freedom of speech, or of the press."

2. The federal regulation at issue provides, in relevant part, as follows:

> (k) *Sales.* (1) No sales shall be made nor admission fee charged and no article may be exposed for sale without a permit except as noted in the following paragraphs.
>
> (2) No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons and bumper stickers. A permit is required for the sale or distribution of permitted merchandise when done with the aid of a stand or structure. Such stand or structure may consist of one table per site, which may be no larger than 2 ½ feet by 8 feet or 4 feet by 4 feet. The dimensions of the sales site may not exceed 6 feet wide by 15 feet long by 6 feet high.

36 C.F.R. § 7.96(k)(1)(2) (1996).

STATEMENT

1. Petitioners are seven nonprofit organizations[1] that seek to educate the general public about their respective beliefs and activities. Four of the organizations[2] are engaged in disseminating information to the general public about issues and projects related to the Vietnam War and the Vietnam Veterans Memorial. These issues and services include providing name rubbings to families and friends of veterans who are unable to visit the Vietnam Veterans Memorial; providing free materials for visitors to make wall rubbings; donating to the Vietnam Veterans Memorial Fund; sponsoring visits by elected officials and others to Vietnam in order to conduct first hand investigations into the status of POW/MIAs; maintaining a scholarship fund for the dependents of Vietnam Veterans; promoting and publicizing issues pertaining to American

---

[1] Although not parties to this petition, several other individuals and organizations are currently involved in litigation over the constitutionality of section 7.96(k)(2), and will be directly affected by the outcome of this petition. One such organization, The Washington D.C. New Columbia Statehood Society (Statehood Society), is a nonprofit organization that seeks statehood for the District of Columbia. The Statehood Society also promotes and sponsors youth crime prevention and recreation programs, maintains programs for the homeless, and sponsors environmental seminars on issues affecting the District of Columbia. *See Williams v. Kennedy*, Civil No. 95-1241 (D.D.C.).

[2] Friends of the Vietnam Veterans Memorial, Americans for Freedom Always, Warriors Incorporated, and The Last Firebase Archives Project.

servicemen who are missing in action, or who are unaccounted for as prisoners of war; and seeking public support for legislation that would strengthen the "Missing Persons Act of 1942." (*See* JA 24-27; 33-38; 46-48).[3]

In order to convey their message and publicize their services, the veterans groups maintain a demonstration/vigil adjacent to the walkway between the Lincoln Memorial and the Vietnam Veterans Memorial, where they distribute literature and talk to interested persons. The veterans groups also sell merchandise, including T-shirts, with a message directly related to their cause and activities in order to spread their message, as well as to raise funds to support their respective services and activities. (JA 24-27; 33-38; 46-48).

The remaining three petitioner organizations[4] endeavor to educate the general public about the secular and spiritual aspects of problems affecting the environment. These issues include such topics as global warming, toxic waste, vegetarianism and animal protection, and the relationship between religion and the environment. (*See* JA 28-32; 39-45). In order to communicate their respective messages, the environmental/religious groups distribute literature and discuss their beliefs and activities with interested persons at various locations on the Mall, such as across from the Air and Space, Natural History, and American History Museums, as well as at the Smithsonian Metro. T-shirts with a message directly

---

[3] "JA" refers to the Joint Appendix filed in the court of appeals.

[4] Gaudiya Vaishnava Society, One World One Family Now, Inc., and Open Art, Inc.

related to their respective missions and activities are also displayed and offered for sale to interested members of the public. (JA 28-32; 39-45).

The petitioners seek to conduct their activities on the Mall and other parks located within the National Capital Area because of the large number and diversity of people that can be found there. "Probably no other civic space in the country is used by so many segments of society for so many different purposes. Tourists come in droves, *but area residents also frequent the Mall or pass through it in the course of their daily business.*" Richard Longstreth, *Introduction: Change and Continuity on the Mall, in The Mall in Washington 1791-1991*, at 11, 11 (Richard Longstreth ed., 1991) (emphasis added).[5] In addition to the numerous museums, exhibits and attractions that surround the Mall, the streets intersecting the Mall serve not only as conduits to the facilities located in the vicinity of the Mall, but are also major transportation arteries for the city and its surrounding localities.

On April 7, 1995, the respondents announced an amendment to 36 C.F.R. § 7.96(k)(2) that limited the sale of printed matter in the National Capital Region parks to books, newspapers, leaflets, pamphlets, buttons, and bumper stickers.[6] The "sale" of all other items, including

---

[5] The veterans organizations have conducted their demonstration/vigil on the Mall since 1982. The religious/environmental groups began their activities on the Mall in 1994.

[6] Prior to the proposed amendment, section 7.96(k)(2) authorized "[t]he sale or distribution of newspapers, leaflets, and pamphlets, conducted without the aid of stands or structures, . . . in all park areas open to the general public

message-bearing T-shirts and such other expressive items as POW/MIA bracelets, patches, and pins, are also prohibited under the new regulation.[7]

2. This action was filed on May 1, 1995, seeking declaratory and injunctive relief, as well as an order temporarily restraining enforcement of the proposed regulation. The parties later filed cross-motions for summary judgment.[8] On September 12, 1995, the district court declared section 7.96(k)(2) to be "invalid as applied to message-bearing T-Shirts." App. 32. The court recognized that respondents "may regulate the appropriate time, place and manner in which message-bearing T-shirts may be sold," and gave the Park Service "a reasonable period

---

except" certain designated park areas not encompassed by the current action. *See* 36 C.F.R. § 7.96(k)(2) (1993). As an "enforcement guideline," however, respondents construed section 7.96(k)(2) to allow the sale of additional "written materials" such as bumper stickers, buttons, posters, and *T-shirts*, "which display a message directly related to the cause and activity." *See* 60 Fed. Reg. 17,639 (Apr. 7, 1995) (emphasis added).

[7] Respondents define "sale" in its broadest sense to include not only the direct exchange of message-bearing merchandise for a fixed selling price, but indirect transactions as well. "For example, restricted merchandise cannot be 'given away' and a 'donation accepted' or one item 'given away' in return for the purchase of another item." 60 Fed. Reg. 17639, 17648 (Apr. 7, 1995). This broad interpretation eviscerates virtually all forms of fundraising that petitioners may employ, and directly led to the arrest and incarceration of eight individuals who were soliciting donations in conjunction with the dissemination of message-bearing materials on September 8, 1997.

[8] Respondents also moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

of time to issue temporary regulations, pending the adoption of a new permanent regulation." App. 32. The court also ordered "the status quo [to] remain in effect pending the adoption of the temporary regulation," and retained jurisdiction to resolve any disputes arising in the interim. App. 32-33. Respondents appealed.

3. Holding section 7.96(k)(2) to be a valid time, place and manner regulation of speech, the court of appeals reversed the decision of the district court. The court specifically found that the regulation was narrowly tailored because "[t]he cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element." App. 4; 116 F.3d at 497. The court also found that the regulation left open adequate alternative channels of communication such as giving away T-shirts or selling them at locations near the Mall, App. 6-7; 116 F.3d at 497, and that it was immaterial that respondents sponsored extensive commercial activities on the Mall. App. 8; 116 F.3d at 498.[9]

---

[9] Permanently located on the Mall are nine food and five retail operations that are licensed by the Park Service to sell a variety of products, including food, beer, film, maps, books, and other souvenir products. During the peak months of April to September, moreover, these fixed facilities are supplemented by fourteen ice cream carts that operate on all parts of the Mall. *See* 60 Fed. Reg. 17,639, 17,647 (Apr. 7, 1995).

REASONS FOR GRANTING THE PETITION

Respondents have completely banned a unique, vital and widely accepted mode of communication – the sale of message-bearing merchandise, including T-shirts – on the National Mall and all other public parks within the National Capital Area.[10] Prior decisions of this Court, however, make clear that section 7.96(k)(2) burdens substantially more speech than is required to achieve respondents' asserted interests, and fails to provide realistic, adequate, and meaningful alternative channels of communication. Related decisions by other courts of appeals and lower federal courts also support petitioners' right to seek funds, and create a clear-cut conflict with the decision of the court of appeals here.

Respondents seek to minimize the significant impact that the ban will have on petitioners' expressive activities by referring to other forms of speech that remain available, such as the distribution of literature, giving out free T-shirts, and speaking to interested people. Lost in this analysis, however, is the recognition that the dissemination of ideas and collection of funds are, in innumerable instances, inextricably intertwined. And, while the government may promulgate reasonable time, place and manner regulations, it may not in the process "unreasonably obstruct or delay the collection of funds," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), or "parcel out" and specifically proscribe the fundraising aspect of petitioners' expressive activities.

---

[10] These other parks include, inter alia, Dupont Circle, the Ellipse and Rock Creek Park.

The total ban on the *sale* of message-bearing T-shirts throughout the National Capital Area parks cannot, therefore, masquerade as a neutral or nonpreclusive regulation, for "the privilege of a citizen of the United States to use the streets and parks for communication . . . must not, in the guise of regulation, be abridged or denied." *Hague v. CIO*, 307 U.S. 496, 516 (1939).

The parks within the National Capital Area are paradigm public fora and should be treated no differently than any other urban fora. Section 7.96(k)(2) is an extreme form of obstruction that "suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). The opposite of a precise and narrow regulation, it cannot withstand scrutiny.

I. THE DECISION BY THE COURT OF APPEALS HAS ACCENTUATED A CLEAR-CUT CONFLICT IN THE COURTS OF APPEALS AND LOWER FEDERAL COURTS AS TO THE APPROPRIATE APPLICATION OF SALES REGULATIONS TO PROTECTED EXPRESSION

Attempts by state and federal authorities to prohibit the sale of message-bearing merchandise in such traditional public fora as sidewalks and parks is an issue that has been extensively litigated in both the appellate and district federal courts with contrasting results. In the seminal case of *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992), the court of appeals reviewed a standardless licensing law that sought to prohibit the sale of message-bearing T-shirts on Fisherman's Wharf. In

striking down the regulation, the court emphasized that the sale of expressive materials serves to

> inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages fixed to the product. This 'informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues' is fully protected speech.

Id. at 1064 (citing *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 63[illegible] (1980)).

The district courts soon applied *Gaudiya Vaishnava Soc'y* to other tourist-oriented venues. In *One World One Family Now v. City of Key West*, 852 F. Supp. 1005 (S.D. Fla. 1994), the court expressly adopted the rationale of *Gaudiya Vaishnava Soc'y* in finding that "there exists a substantial likelihood that the sale of message-bearing T-shirts will be found to be fully protected First Amendment activity" *id.* at 1008, and that the City of Key West could not prohibit the sale of message-bearing T-shirts from small, portable tables in the heart of the City's commercial and tourist district, despite the City's interests in avoiding pedestrian congestion and maintaining the historical ambiance of Duval Street and the surrounding area.

In holding that the sale of message-bearing T-shirts could not be prohibited on the Las Vegas Strip, the court in *One World One Family Now v. Nevada*, 860 F. Supp. 1457 (D. Nev. 1994) also found it "clear that the Ninth Circuit considers the sale of message-bearing merchandise to be

activity entitled to full First Amendment protection." *Id.* at 1461.[11]

A significant change in direction occurred, however, in *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009 (9th Cir.), *cert. denied*, 117 S. Ct. 554 (1996), where the court of appeals upheld for the first time a municipal peddling ordinance that banned the sale of message-bearing T-shirts in the entire Waikiki section of Honolulu. Over a pointed dissent, the court found the peddling ordinance to be a content neutral regulation that was narrowly tailored to further the City's interests in controlling pedestrian congestion, preserving the aesthetic appearance of Waikiki, and protecting local merchants from unfair competition. *Id.* at 1012-13. The court also found that the ordinance left ample adequate alternative channels of communication such as handing out literature, proselytizing, soliciting donations, or selling T-shirts through local retail outlets. *Id.* at 1014.

City & County of Honolulu was followed by the decision here, where the court of appeals upheld 36 C.F.R. § 7.96(k)(2) as applied to sale of message bearing T-shirts and other expressive items such as Vietnam-related POW/MIA bracelets, commemorative pins, and patches depicting the various units that fought in the Vietnam War, in all federal parkland located within the National Capital Area. The court found that the regulation was

---

[11] *See also International Soc'y for Krishna Consciousness, Inc. v. San Diego Unified Port Dist.*, No. 91-1768-B(LSP) (S.D. Cal. Dec. 10, 1992) (upholding right to sell message-bearing T-shirts at Seaport Village and other locations along the San Diego waterfront area).

narrowly tailored to reduce "discordant commercialism" on the Mall, and that petitioners were free to give away T-shirts or sell them at locations near the Mall. App. 6-7; 116 F.3d at 497.[12]

In sharp contrast to the decision below and *City & County of Honolulu*, the Seventh Circuit in *Ayres v. City of Chicago*, No. 97-2373, 1997 WL 563220 (7th Cir. Sept. 4, 1997) recently affirmed a preliminary injunction of a Chicago peddlers' ordinance barring the sale of message-bearing T-shirts at City-sponsored festivals in Grant Park. The court discounted the City's asserted interests in avoiding pedestrian traffic congestion, *id.* at *2, protecting approved vendors from unfair competition, *id.* at *3, and safeguarding the aesthetics of the park. *Id.* at *5. The court was also persuaded by the numerous and obviously less burdensome alternatives to a complete ban that were available. *Id.*

Although dealing with a form of expression different than message-bearing T-shirts, a recent decision by the Second Circuit nonetheless underscores the conflict that exists amongst the circuits with respect to application of commercial vending laws to First Amendment sales activities. In *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997), the court considered a

---

[12] The decision below was preceded by and based upon *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), where the court upheld section 7.96(k)(2) as applied to the sale of religious beads and audio cassette tapes on the Mall across from the Air and Space Museum by members of the Krishna consciousness religion.

General Vendors Law that barred visual artists from selling or offering their works for sale in public places without first obtaining a license. The City viewed the artists' expression as "mere 'merchandise' lacking in communicative concepts or ideas." *Id.* at 695.

The court of appeals, however, condemned this "unduly restricted view of the First Amendment and of visual art itself." *Id.* "Such myopic vision," the court declared, "not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression." *Id.* The court emphasized that the fundamental purpose of the First Amendment "is to protect all forms of peaceful expression in all its myriad manifestations," *Id.* at 694 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)), and that while "[t]he City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, . . . it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice." 97 F.3d at 697.

Ayres and *Bery* are thus fully applicable to the facts, circumstances and legal theories relevant to this case, and create a direct conflict with the holding of the court below.

II. IN UPHOLDING THE CONSTITUTIONALITY OF THE SALES BAN, THE COURT OF APPEALS IMPROPERLY DENIGRATED THE PROTECTED STATUS OF PETITIONERS' FUNDRAISING ACTIVITIES, WHICH IT "PARCELED OUT" FOR PROSCRIPTION.

Central to the court of appeals' decision was its contention that "raising money is not a First Amendment concern that the regulation bears upon," App. 7; 116 F.3d at 497, and that "it is only the expression inherent in the transmission of the t-shirt from the seller to the buyer – and not the fact that the seller raises money thereby – which warrants constitutional protection." *Id.* This view is inconsistent with the First Amendment protection this Court has long afforded fundraising.

In thus overturning the conviction of a member of the Jehovah's Witnesses who violated an ordinance prohibiting the distribution of handbills, the Court in *Jamison v. Texas*, 318 U.S. 413 (1943), held that literature distribution "in the pursuit of a clearly religious activity" may not be prohibited "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." *Id.* at 417.

A short time later, the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943), extended the protection afforded an invitation to purchase literature to the purchase itself. In striking down a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee, the Court emphasized that "the mere fact that religious literature is

'sold' . . . rather than 'donated' does not transform evangelism into a commercial venture." *Id.* at 111. The Court astutely recognized that "religious organization[s] need[ ] funds to remain a going concern." *Id.*

In finding that certain provisions of the Federal Election Campaign Act limiting expenditures by political candidates on their own behalf violated the candidates' right to freedom of speech, the Court in *Buckley v. Valeo,* 424 U.S. 1 (1976) explained that

> [s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

Id. at 16.

As did the Court in *Murdock,* so too the *Buckley* Court recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." *Id.* at 19. The Court thus concluded that the expenditure restrictions in the Act "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* In the same way, respondents' application of section 7.96(k)(2) to plaintiffs' sales and fundraising activities would have a devastating impact on plaintiffs' ability to disseminate their political, religious, charitable, and educational messages.

In *Village of Schaumberg*, the Village argued, much like the respondents here, that its ordinance requiring charitable organizations engaged in door-to-door and on-street fundraising to use at least 75% of their receipts for charitable purposes, "should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money." *Id.* at 628. The Court, however, found this rationale "far too limited" *id.*, and, in striking down the percentage limitation, emphasized "that charitable appeals for funds, . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Id.* at 632.

The rationale of *Schaumberg* was extended to contracts between charities and professional fundraisers in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). The statute in question prohibited charities from entering into contracts if, after allowing for the deduction of various costs, the fundraiser retained more than 25% of the money collected. In defense of the statute, the State argued that the restriction affected only the "economic" relationship between the charities and professional fundraisers, and was therefore free of First Amendment implication. The Court, however, viewed the law as "a direct restriction on protected First Amendment activity," *id.* at 967, and held the statute to be an unconstitutional restriction on the charities' fundraising activities. *Id.* at 968.

The same rationale was advanced in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), where the Court struck down a North Carolina law establishing a three-tier, percentage based restriction on fees charged by professional fundraisers. As in *Munson* and *Schaumberg*, the State in *Riley* argued that the restriction on fees was "simply an economic regulation with no First Amendment implication, and therefore must be tested only for rationality." 487 U.S. at 790. The Court, however, "again reject[ed] that argument" *id.*, and in a passage directly applicable here, instructed that "where . . . the component parts of a single speech are inextricably intertwined we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* at 796.

The constitutional significance of financial compensation was recently reiterated in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), where the Court found that "[a]lthough § 501(b) [of the Ethics in Government Act of 1978] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation [for making speeches or writing articles] imposes a significant burden on expressive activity." *Id.* at 1014. The Court thus concluded that "the honoraria ban imposes the kind of burden that abridges speech under the First Amendment." *Id.*

In *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), the court held that "parody trading cards" featuring active major league baseball players was fully protected speech. The court observed that "many untraditional forms of expression are

. . . protected by the First Amendment" *id.* at 969, and "even if the trading cards are not a traditional medium of expression, they nonetheless contain expressive speech." *Id.* The court found that the trading cards were not "commercial merchandise rather than protected speech," and could "see no principled distinction between speech and merchandise that informs our First Amendment analysis." *Id.* at 969-70. The court concluded that "the fact that expressive materials are sold neither renders the speech unprotected, . . . nor alters the level of protection under the First Amendment," and that "Cardtoons need not give away its trading cards in order to bring them within the ambit of the First Amendment." *Id.* at 970.

The court of appeals' treatment of fundraising also fails to acknowledge that displaying and selling T-shirts entails an act that is itself expressive, a contribution to the cause. In *Buckley*, for example, the Court recognized that a political "contribution serves as a general expression of support for the candidate and his views." 424 U.S. at 21. Similarly, in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) the Court observed that the type of "face-to-face encounter[s]" that petitioners employ here provides an important "opportunity for the propagation of ideas and the exchange of views," *Id.* at 798, and that "an employee's contribution [to the Combined Federal Campaign] in response to a request for funds functions as a general expression of support for the recipient and its views." *Id.* at 799.

In the specific context of message-bearing T-shirts, the district court in *Ayres v. City of Chicago*, 966 F. Supp. 701 (N.D. Ill. 1997), *aff'd*, 1997 WL 563220 (7th Cir. Sept. 4,

1997), explained that message-bearing T-shirts are purchased primarily for their "psychological value. A party who purchases it tends to agree with [the seller's] position, is willing to give money for the cause and is willing to promote the idea by wearing the T-shirt." *Id.* at 715.

Thus, where, as here, petitioners display their expressive T-shirts, distribute literature, and speak to people about their activities and beliefs, the sale of message-bearing materials as a form of communication and fundraising may not be "parceled out" and prohibited. *See also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997).

III. THE COURT OF APPEALS' DECISION DISREGARDS NUMEROUS AND OBVIOUSLY LESS BURDENSOME ALTERNATIVES TO A COMPLETE BAN ON NONCOMMERCIAL SALES.

To satisfy the narrow tailoring requirement, a regulation "need not be the least restrictive or least-intrusive means" of serving the government's interest. *Ward*, 491 U.S. at 798. However, a regulation that "burden[s] substantially more speech than is necessary to further the government's legitimate interests" is not "narrowly tailored" *id.* at 799, particularly where "there are numerous and obvious less-burdensome alternatives to the restriction on . . . speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *see Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 479 (1989).

This approach has been widely followed amongst the courts of appeals. In *Project 80's, Inc. v. City of Pocatello,*

942 F.2d 635, 638 (9th Cir. 1991), the Ninth Circuit emphasized that "[b]y pointing out the alternatives available to the cities to advance their interests, we do not impose a least restrictive means requirement. Rather, we conclude, as did the Supreme Court in *Fox*, that restrictions which disregard far less restrictive and more precise means are not narrowly tailored." The court in *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993), observed that "[w]hile the [Airport] Commission need not choose the most reasonable regulation available to it, its failure to select this simple, available alternative suggests something about both the veracity of its asserted justification and the reasonableness of its blanket ban." *Id.* at 161. In *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), the court found it "evident that the County could promote its interests [in aesthetics and traffic safety] through other, less restrictive means" than a two-sign limit in residential neighborhoods. *Id.* at 594. And, the court of appeals in *Bery* observed that "[t]he City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice." 97 F.3d at 697.

At the administrative stage of these proceedings petitioners submitted extensive time, place and manner regulations that would have effectively addressed respondents' asserted interests without the necessity of a total ban on their fundraising activities. (*See* JA 49-70).

These proposals, however, were summarily rejected. Thus, while section 7.96(k)(2) "arguably eliminates the 'sources of evil' that allegedly threaten" the Park Service's interest in avoiding discordant commercialism, "it does so at too high a cost, namely, by significantly restricting a substantial quantity of speech that does not impede [the Park Service's] permissible goals." *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990).

IV. SECTION 7.96(k)(2) DOES NOT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION.

This Court has observed that "even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.' " *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994). The Court has thus held invalid regulations that prevent the speaker from using a "unique and important" mode of expression for which there is "no practical substitute." *Id.* at 2045.

The court of appeals was mistaken in finding that modes of communication that do not include fundraising were adequate and ample alternatives to the sale of message-bearing merchandise. In *Village of Schaumberg*, the Court emphasized that while "[s]oliciting financial support is undoubtedly subject to reasonable regulation," it "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for

particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." 444 U.S. at 632.

Similarly, in *Cornelius* the Court again warned that "without the funds obtained from solicitation in various fora, [an] organization's continuing ability to communicate its ideas and goals may be jeopardized." 473 U.S. at 799.

In the present case, section 7.96(k)(2) allows the free distribution of message-bearing T-shirts. Without the ability to sell, however, petitioners have no way of paying for the literature and T-shirts which they distribute or supporting their respective causes. As the district court below observed, "[a]llowing groups to give away T-shirts is not an ample alternative means of communication. Few non-profit groups can afford to give away large numbers of message-bearing T-shirts, which cost money to design, print and produce." App. 22; 899 F. Supp. at 685. The court further observed that "[t]he sale of T-shirts is . . . the primary means by which many . . . groups are able to raise money in order to continue to engage in spreading their message." *Id.*

The district court in *Ayres* also found that "T-shirts are the primary and most effective means of financing MPAC's activities and promoting its message. The Court finds that the sale of T-shirts is a vital means by which Plaintiff communicates MPAC's message and that T-shirts represent a form of expressive speech protected by the First Amendment and is not simply commercial speech." 899 F. Supp. at 715.

And in *Bery*, the court emphasized that "[t]he sale of protected materials is also protected," *id.* at 695, and that without the opportunity to raise funds the artists "would not have engaged in the protected expressive activity." *Id.* at 696.

Section 7.96(k)(2) thus deprives petitioners of a "unique and important" mode of expression for which there is "no practical substitute."[13]

---

[13] Section 7.96(k)(2) also fails to provide an alternative *location* where plaintiffs can contact the audience that they would otherwise find in the National Capital Area parks. Restrictions have been upheld, for example, where the challenged ordinance "does not affect the [speaker's] freedom to exercise the right to speak and distribute literature *in the same place* where the posting of signs on public property is prohibited," *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (emphasis added), and the regulation "has not been shown to deny access within the forum in question." *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981). Here, in contrast, petitioners do not have an alternative location within the relevant forum, as did the Krishnas in *Heffron*. Rather, petitioners are totally excluded from all parkland within the National Capital Area, including the Mall, which in most respects is the only place where petitioners can find their intended audience.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID M. LIBERMAN
Counsel of Record
1888 Century Park East
Suite 1750
Los Angeles, California 90067
(310) 277-9288

November 6, 1997

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 11, 1997 Decided June 6, 1997

No. 95-5393

FRIENDS OF THE VIETNAM VETERANS MEMORIAL, ET AL.,

APPELLEES

v.

ROGER G. KENNEDY, DIRECTOR, NATIONAL PARK SERVICE, ET AL.,

APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(95cv00808)

Marina Utgoff-Braswell, Assistant United States Attorney, argued the cause for appellants, with whom *Eric H. Holder, Jr.*, United States Attorney, and *R. Craig Lawrence*, Assistant United States Attorney, were on the briefs.

David M. Liberman argued the cause for appellees, with whom *Alexander P. Humphrey* was on the brief.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Arthur B. Spitzer was on the brief for *amicus curiae* American Civil Liberties Union of the National Capital Area.

Before: SILBERMAN, RANDOLPH, and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: The National Park Service prohibits the sale of a number of items, among them t-shirts, on the National Mall. Friends of the Vietnam Veterans Memorial challenged that prohibition as a violation of the First Amendment and prevailed in the district court. We reverse.

I.

The Mall is an approximately two-mile long strip of national parkland situated in the midst of Washington, D.C. It is the site of monuments marking great figures and events in our nation's history. At the west end sits the Lincoln Memorial, flanked to the north by the Vietnam Veterans Memorial and to the south by the Korean War Veterans Memorial. The towering Washington Monument stands in the middle of the Mall, the museums of the Smithsonian run along either side, and the United States Capitol forms the eastern border. But the Mall is more than home to these enduring symbols of our nationhood. Its grassy expanse provides areas for any number of recreational activities, and its location in the heart of

the nation's capital makes it a prime location for demonstrations. It is here where Martin Luther King, Jr., delivered his famous "I Have a Dream" speech, where both sides of the abortion debate have staged passionate demonstrations, and where on any given day one may witness people gathering to voice their public concerns. As we have said before, "It is here that the constitutional rights of speech and peaceful assembly find their fullest expression." *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 952 (D.C. Cir. 1995).

But Congress has charged the National Park Service with regulating the use of the Mall so as to "conform" such use "to the fundamental purpose" of "conserv[ing] the scenery and the natural and historic objects . . . and . . . provid[ing] for the enjoyment of the same in such manner . . . as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (1994). To this end, the Park Service has promulgated regulations providing that "[d]emonstrations and special events may be held only pursuant to a permit issued" by the Park Service. Although the Park Service has generally prohibited sales on federal parkland in the D.C. area without a (rarely issued) permit, it did in 1976 promulgate a regulation allowing the sale or distribution of "newspapers, leaflets and pamphlets" *in the context* of special events and demonstrations. Over time, the Park Service issued enforcement guidelines extending "newspapers, leaflets and pamphlets" to include t-shirts, bumper stickers, buttons, and posters, so long as the sale of those items conveyed a message "directly related" to the special event or demonstration. In 1995, however, concerned chiefly with an increasing atmosphere of commercialism

on the Mall, the Park Service rescinded its enforcement guidelines and promulgated a regulation limiting sales on federal parkland in the D.C. area to "books, newspapers, leaflets, pamphlets, buttons and bumper stickers." 36 C.F.R. § 7.96(k)(1), (2) (1996).

Friends of the Vietnam Veterans Memorial (Friends), along with six other nonprofit organizations[1] that "seek to educate the general public about their respective beliefs and activities," sought declarative and injunctive relief in the district court on the ground that the new regulation, as applied to prohibit the sale of message-bearing t-shirts on the Mall, violated the First Amendment. The district court agreed and enjoined the regulation.

II.

The government contends that the district judge's order is palpably in conflict with our recent opinion in *ISKCON*. We agree. There, we reviewed the constitutionality of this very same regulation insofar as it prohibited in-person solicitations, the sale of audiotapes, and the sale of religious beads on the Mall. We determined that the regulation was content-neutral and would thus be upheld as long it was " 'narrowly [tailored] to serve a significant governmental interest' " and " 'le[ft] open ample alternative channels for communication' of the message." 61 F.3d at 955 (quoting *Clark v. Community for*

---

[1] These include Gaudiya Vaishnava Society, One World One Family Now, Inc., Warriors Inc., Open Art, Inc., Last Firebase Archives Project, and Americans for Freedom Always.

Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1527 (D.C. Cir. 1984). Although the solicitation ban did not pass muster – we could not see how allowing "individuals or groups participating in an authorized demonstration . . . to solicit donations within the confines of a restricted permit area" would "add to whatever adverse impact [would] result" from the demonstration itself, 61 F.3d at 956 – we upheld the proscription on the *sale* of beads and audiotapes. We rejected the argument that the regulation was fatally underinclusive because it prohibited the sale of beads and audiotapes while permitting the sale of, for example, books and bumper stickers. We did not think that underinclusiveness "ha[d] the effect of favoring a particular view" or "diminish[ed] the credibility of the Park Service's rationale" for prohibiting the sale of certain items. *See id.* at 956-57; *but see id.* at 960 (Ginsburg, J., concurring in part and dissenting in part). Because the regulation was not " 'substantially broader than necessary to achieve the government's interests,' " and because the alternative ways in which the complainants could express their message were "more than adequate," the regulation did not violate the First Amendment. *See id.* at 958 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

Friends concede that the government's asserted interests in reducing "discordant and excessive commercialism, as well as degraded aesthetic values," *id.* at 952 (citing 59 Fed.Reg. at 25,857 (1994)), are legitimate. In *ISKCON*, we thought those interests jeopardized by the sale of beads and audiotapes. It is the Park Service's view that the "relatively constant, intrusive and intimidating"

t-shirt sales activities were largely responsible for the "pronounced commercialization" of the Mall that the regulation seeks to contain. 60 Fed.Reg. at 17,644 (1995). The Service may certainly take steps to limit the commercialization of the Mall, and the record is replete with evidence that t-shirt sales, even more than the sale of beads and audiotapes, substantially contributed to that phenomenon. We agree with Judge Ginsburg that, if anything, the ban on t-shirt sales is more easily justified than the ban on audiotapes. *See* 61 F.3d at 961 (Ginsburg, J., concurring in part and dissenting in part). If the Park Service's interests were significant in *ISKCON*, then *a fortiori* they are significant here.

Friends argue that t-shirts should nevertheless be distinguished from beads and audiotapes. The district court in this regard characterized the sale of t-shirts as "a unique and especially effective means of communicating the plaintiffs' point of view" because the purchaser aids the seller in spreading the message by *wearing* the t-shirt; the buyer becomes, in the district judge's words, "a human billboard." (Under that reasoning, the sale of billboards would be even more entitled to protection.) But the very billboard characteristics of the t-shirt – its eye-catching nature – make its display for sale and sale on parkland a particularly discordant interruption of the park's tranquility. And that the buyer may wear the t-shirt on parkland or elsewhere does not support appellee's asserted First Amendment right to engage in a sale on park premises.

Of course, there is nothing to stop appellees from giving away their expressive t-shirts on the Mall (or

selling them near the Mall). That is unsatisfactory, according to Friends, because it does not promise an adequate source of fundraising. Yet raising money is not a First Amendment concern that the regulation bears upon: The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (charitable solicitation is protected because it is "characteristically intertwined with informative and perhaps persuasive speech"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) (speech is protected "even though it is . . . in the *form* of a solicitation") (emphasis added). We do not deny that the sale of a t-shirt is expressive, but it is only the expression inherent in the transmission of the t-shirt from the seller to the buyer – and not the fact that the seller raises money thereby – which warrants constitutional protection.[2]

---

[2] The government relies on *White House Vigil*, 746 F.2d at 1540-41, in which we questioned (in dicta) whether a restriction on placing parcels on a sidewalk during a demonstration warrants any First Amendment concern at all. The government would have us conduct a preliminary inquiry into whether proscribing the sale of an expressive item poses more than a "minimal" burden on expression. That is a curious position in light of the long-established proposition that an expressive item does not lose its protection simply because it is sold. *See, e.g., ISKCON*, 61 F.3d at 953. As the t-shirts in question are message-bearing, the regulation proscribing their sale on the Mall, like one proscribing the sale of books or newspapers, raises First Amendment concerns. *Accord One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir.), *cert. denied*, 117 S. Ct. 554 (1996).

Friends' final contention is that the Park Service's blanket ban on t-shirt sales on the Mall should have been more narrowly tailored to allow the sale of t-shirts in areas where the Park Service already tolerates a certain degree of commercialism. In this regard, Friends point out that the Park Service, pursuant to its statutory mandate to provide "services . . . necessary and appropriate for public use" and that "are consistent to the highest practicable degree with the preservation and conservation" of the national parks, 16 U.S.C. § 20 (1994), allows the sale of t-shirts (among other paraphernalia) from regulated kiosks. Friends also emphasize that certain areas of the Mall, such as the area in front of the National Air and Space Museum, are virtually overrun with tourists and thus suffer from the effects the Park Service complains of regardless of whether appellants are there selling t-shirts.[3] Although it may be that the Park Service could have limited its regulation to allow the sale of t-shirts in some particular locales, it also may be that the Park Service could have more broadly proscribed the sale of items, message-bearing and otherwise, on the Mall. Our inquiry is directed not at what the Park Service could have done, but rather at what it did, and whether that action furthers significant interests, does not burden substantially more speech than necessary to achieve those interests, and leaves open ample alternative means of

---

[3] In a related point, Friends rely on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), to contend that the validity of the regulation is fatally undermined by the activities the Park Service allows. But see *ISKCON*, 61 F.3d at 957 (squarely rejecting this argument in evaluating the same regulation).

communication. This task does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained." *Clark*, 468 U.S. at 299.[4]

* * *

For the reasons stated, we reverse the district court's conclusion that the Park Service's regulation violates the First Amendment.

So ordered.

---

[4] On appeal, amicus American Civil Liberties Union repeatedly asserts that this case presents a "facial challenge" to the regulation. But this assertion is at odds with the complaint below and the argument as joined by the parties on appeal, so we ignore it. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5393 **September Term, 1996**

Friends of the Vietnam Veterans Memorial, et al.,
Appellees

v.

Roger G. Kennedy, Director, National Park Service, et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 95cv00808)

Before: SILBERMAN, RANDOLPH and ROGERS, *Circuit Judges.*

JUDGMENT

(Filed Jun. 6, 1997)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the district court appealed from in this cause

is hereby reversed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: June 6, 1997

Opinion for the Court filed by Circuit Judge Silberman.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE VIETNAM MEMORIAL, *et al.* Plaintiffs, v. ROGER G. KENNEDY, *et al.* Defendants.	Civil Action No. 95-808 (Stanley Sporkin)

MEMORANDUM OPINION

(Filed Sep. 12, 1995)

The issue before this Court is whether a National Parks Service Regulation banning the sale of message bearing T-Shirts on the Mall and other parks in the National Capital area violates the First Amendment of the Constitution. Plaintiffs are a number of nonprofit groups, who engage in the sale of message-bearing T-Shirts on the National Mall.

I. Background

Seven groups, Friends of the Vietnam Veterans Memorial (FVVM), Gaudiya Vaishnava Society (GVS), One World One Family Now (One World), Warriors Incorporated, Open Art, Last Firebase, Americans for Freedom Always (AFFA),[1] have challenged the Parks Department

[1] The Court also granted motions by the American Alliance for Rights and Responsibilities and the American Civil Liberties Union of the National Capital Area to appear as *amici curiae*.

Regulation 36 C.F.R. § 7.96(k)(2) as a violation of their rights under the First Amendment to the Constitution.[2] Four of the seven groups attempt to raise public awareness about POW/MIAs from the Vietnam War and use message bearing T-shirts as a way to spread their message. Other plaintiff groups, such as Open Art are protesting environmental damage such as global warming and depletion of the ozone layer.

In pertinent part the regulation in question, 36 C.F.R. § 7.96(k) (2) reads:

> No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons, and bumper stickers.

The primary focus of the parties has been the effect of the regulation as it applies to the sale of T-shirts on the National Mall. Indeed, in its commentary on the regulation, the National Park Service had this to say:

> After careful consideration, the NPS has concluded that the basic problem of commercialization and attendant adverse impacts on park values is caused by T-shirt sales. It has also concluded that the problem cannot be abated by other than a ban on such sales on park land. (National Capital Regions Parks; Special Regulations, 60 Fed. Reg. at 17642 (1995).)

The Mall runs from the grounds of the Capital to the Lincoln Memorial and is bordered by a series of major thoroughfares including Pennsylvania Avenue, Madison

---

[2] "Congress shall make no law abridging . . . the feedom of speech. . . . " U.S. Const. amend. I.

Drive, and Constitution Avenue to the North and Maryland Avenue, Jefferson Drive, and Independence Avenue on the South. Tourist attractions such as the Smithsonian Institute, and the National Air and Space Museum, and numerous government buildings border the Mall.

Millions of people come to the Mall every year. It is regularly visited by sunbathers, runners, softball and touch football players, strollers and others visiting the monuments or simply coming to enjoy the park. It is the site of festivals and concerts both large and small.

The National Mall also has a venerable history as the site of some of the largest demonstrations in this nation's history concerning important issues. Martin Luther King made his "I Have A Dream" speech before a crowd of over 100,000 on the Mall during the 1963 March on Washington.[3] Numerous demonstrations against the Vietnam War were held there;[4] more recently groups advocating for and against restrictions on abortion have gathered on the Mall.

Although the parties focused on the Mall in their briefs and in argument, the ban on sales applies to other parks in the District of Columbia, including Dupont Circle, the Ellipse and Rock Creek Park.

---

[3] *See, e.g.*, Taylor Branch, *Parting the Waters, America During the King Years*, 881-83 (1988).

[4] For example, the 1967 March on the Pentagon assembled at the reflecting pool. *See, e.g.*, Norman Mailer, *The Armies of the Night*, 105-23 (1968).

II. Analysis

A.

In determining whether the regulation is constitutional as applied, the Court must first determine whether plaintiffs are engaged in activities protected by the First Amendment. Although the language of the First Amendment refers to "freedom of speech," it is undisputed that the Constitution protects more than oral expression. The Supreme Court has found burning the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989), words written on clothing, *Cohen v. California*, 403 U.S. 15 (1971),[5] and black armbands worn to protest the Vietnam War, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-06 (1969), to be protected by the First Amendment. The plaintiffs in this case are selling materials that convey distinct messages, such as T-Shirts that attempt to raise public concern about the plight of MIAs and POWs in Vietnam.

B.

In *Iskcon v. Ridenour*, 93-5301 (D.C. Cir. Aug. 8, 1995), the Court of Appeals considered a challenge by the International Society of Krishna Consciousness to the validity of the Parks Service regulation as applied to solicitation and the sale of religious beads on the Mall. Judge Buckley's majority opinion and Judge Ginsberg's dissent in *Iskcon* set forth much of the applicable First Amendment law.

---

[5] Overturning conviction on First Amendment grounds of man wearing jacket bearing the words " * * * * the Draft."

The Mall and other parks in the Nation's Capital are public forums. *See United States v. Grace*, 461 U.S. 171, 177 (1983) ("Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' ").

In determining how far the government may go in imposing restrictions on expression in a public forum, the *Iskcon* panel analyzed the regulation under the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Under that test, restrictions are valid if they are 1) content neutral, 2) narrowly tailored to serve a significant governmental interest, and 3) leave open ample alternative channels for communication of the information. *See Id.* at 791.[6]

---

[6] The plaintiffs argue that even though the regulation is content neutral, this Court must subject it to strict scrutiny because it *bans* an entire medium of communication rather than imposing an ordinary time, place or manner restriction. *See United States v. Grace*, 461 U.S. 171, 177 (1983) (differentiating between typical time, place and manner restrictions and regulations that completely banned a particular form of expression); *see also Chesapeake & Potomac Telephone Co. of Va. v. United States*, 42 F.3d 181, 203 (4th Cir. 1994).

However, in its most recent opinion concerning a total ban (or near complete ban) on residential signs, the Supreme Court appeared to use the traditional time, place and manner test in deciding whether to invalidate a municipal ordinance. *See City of Ladue v. Gilleo*, 114 S.Ct. 2038, 2046 (1994). There is tension between the balancing test employed in *Ladue* and the Court's use of strict scrutiny in *Grace*. Underlying First Amendment principles suggest that the approach taken in *Ladue* is appropriate here. Courts apply strict scrutiny to government restrictions on speech based on its content. "For if the

The *Iskcon* court found the regulation at issue here was content neutral.[7] But the panel unanimously found that the regulation banning solicitation was not narrowly tailored. *See Iskcon*, at 11-12 (Government interest in preventing "ills associated with runaway solicitation" does not justify sweeping ban on in-person solicitation

---

constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " Laurence Tribe, American Constitutional Law, § 12-2 at 790 (2d ed.) (citing *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)). The purpose of applying strict scrutiny is to prevent any government effort to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). Where, as here, the government makes no effort to target certain messages and not others, but aims instead at the harmful effects of the activity, strict scrutiny is not called for. *See* American Constitutional Law, § 12.2, at 791.

The Court must nevertheless be particularly wary of content-neutral restrictions that ban a particular medium, or a number of media of expression, because a total ban creates a greater risk of sweeping more broadly than most content neutral restrictions, and failing to leave open ample alternative means of communication. *See City of Ladue v. Gilleo*, 114 S.Ct. 2038 (1994); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993) ("[C]ourts have rarely upheld complete bans on a category of First Amendment expression.") In this case, because the Court finds the regulation invalid, as applied, under the traditional time, place and manner test, the decision not to apply strict scrutiny is not crucial to the holding.

[7] A regulation is content-neutral if it "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). All parties, and amici agree that the regulation is content neutral because the sale of T-Shirts, and other items, is banned regardless of the content of the message they bear.

throughout the Mall.) The majority of the panel upheld the ban on sales as applied to beads and audiotapes, because it was narrowly tailored and left open ample alternative means of communication.[8] The opinion was silent with respect to message-bearing T-shirts.

III. The Cited Governmental Interests

"In a First Amendment challenge, the government bears the burden of showing that its restriction of speech is justified under the traditionally narrowly tailored test." *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992). In attempting to justify the new sales regulation the government has proffered five interests that it claims are significant.

The government places the most emphasis on its first purported interest – eliminating "discordant and excessive commercialism [on] federal land" and the resulting "degraded aesthetic values." Administrative Record (hereinafter "AR") at L. The government also claims that the sales regulation is narrowly tailored to serve the significant interest of relieving "increasing pedestrian and vehicle congestion," AR at E, preventing damage to the Mall's trees, shrubs, grass and soil, *id.* preserving unimpaired views of the monuments, and finally preventing "criminally related offenses." *Id.*

The primary interest that the government relies on to justify its regulation is preventing "discordant commercialism" and eliminating a "flea market" atmosphere in

---

[8] Judge Ginsberg dissented.

National Parks. AR at C.[9] The government has developed the record on this issue more than on any other. It has submitted numerous written statements about the effect of vendors on the Mall and photographs of various portions of the Mall. Despite the Park Service's action, the Court finds the absolute ban on the sale of T-Shirts invalid on two grounds. First, the sales ban does not leave open ample alternative means of communication; second, it is not narrowly tailored to achieve the government's interest.

IV. Ample Alternative Means of Communication

In *Iskcon*, the divided panel found that a sales ban on beads did leave open ample alternative means of communication. Beads and T-Shirts are a significantly different form of communication, however. A complete ban on the sale of message-bearing T-Shirts, does not leave open ample alternative means of communication for two reasons. First, the message-bearing T-shirt is a unique and especially effective means of communicating the plaintiffs' point of view. Second, sale of the T-shirts is the primary source of funds that enable these groups to continue to engage in their First Amendment activities.

The T-Shirt has become a unique means of spreading messages over the last twenty years. Unlike a book or pamphlet, the T-Shirt not only carries a message, it also

---

[9] Former National Park Service Director James Rittenour has supported the regulation as a means to eliminate "the carnival atmosphere that erodes the dignity of our national capital parks and memorial." AR at E.

turns the wearer into a "human billboard". *See* Affidavit of Larry Bice at ¶ 6 ("The sale of T-shirts containing a POW/MIA message is also our most effective form of communication. By obtaining and wearing one of our shirts, visitors carry our message all over the United States and the world. Indeed, no other mode of communication within our financial capacity has had the positive impact of message-bearing T-shirts."); *see also* affidavit of Gregory Scharf at ¶ 4; affidavit of Walt Sides at ¶ 4; affidavit of Hans G. Bickel at ¶ 2. As such, it is an effective and inexpensive way to spread the seller's message broadly.

While the message-bearing T-shirt may be a relatively new form of communication it has become a popular and indispensable means of communication for non-profit groups like plaintiffs. *See generally* affidavits attached to plaintiffs, application for temporary restraining order. In some ways message bearing T-shirts serve the same purpose as the pamphlet did when this country was merely a British colony. Courts must be continually on guard to ensure that the First Amendment protections are relevant to the reality of modern expression. It is for this reason that the Supreme Court has found that the First Amendment protects forms of expression like movies, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 501, and cable television broadcasting, *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. at 2456-57, that the Founding Fathers might never have envisioned. Similarly, this Court must take into account the unique role that message-bearing T-Shirts, a relatively new form of expression, plays in allowing small non-profit groups, like the veterans organizations at the Vietnam memorial, to

spread their message. *See Ladue*, 114 S.Ct. at 2046-47 (recognizing the special and distinct nature of residential signs as opposed to bumper stickers or sandwich boards); *see also Metromedia*, 453 U.S. at 527 (Brennan, J. concurring in judgment) (recognizing the importance of considering the different natures and values of various media of expression.)

What is more, message-bearing T-Shirts have become an integral part of large-scale single day demonstrations or marches. During these events, many marchers wear T-Shirts that carry messages that further the expressive function of the march. The message-bearing T-Shirt enables the protester or marcher to express his or her point of view visually and demonstrate solidarity with his or her fellow marchers. The message-bearing T-Shirt serves as the voice for those who, because of age or infirmity, cannot speak, chant or sing. The availability of large numbers of T-Shirts all carrying a visually and ideologically identical message creates a coherence within the march and thereby increases the power of its message. Simply put, message-bearing T-shirts have become an essential part of almost all marches and protests. Books, pamphlets and bumper stickers cannot serve the same function and clearly cannot be considered adequate alternative means of expression. At this point in history, a march without message-bearing T-Shirts would be like a sporting event without pennants or banners.

The government has conceded that the ban on the sale of message-bearing T-Shirts does not extend to giving them away. It is the government's position that the commercial aspect of the activity deprives it of First

Amendment protection. The government's position is neither factually nor legally sustainable. Allowing groups to give away T-Shirts is not an ample alternative means of communication. Few non-profit groups can afford to give away large numbers of message-bearing T-Shirts, which cost money to design, print and produce. The sale of T-Shirts is also the primary means by which many of the plaintiff groups are able to raise money in order to continue to engage in spreading their message. *See* affidavit of Ira Hamburg at ¶ 4 ("The sale of message-bearing T-Shirts is vital to [Friend's of the Vietnam Memorial's] mission. [E]xpressive T-Shirts are our principal method of raising funds to support our activities. . . . "); *see also* affidavit of Swami B.V. Tripurari at ¶ 4; affidavit of Walt Sides at ¶ 4; affidavit of John Holland at ¶ 6. Forbidding the sale of message-bearing T-shirts would substantially impair the ability of the plaintiff groups to spread their messages.

Preventing the non-profit plaintiffs in this case from selling T-Shirts would place a significant burden on their efforts to disseminate T-Shirts bearing their groups' message. People who buy the shirts and wear them help the groups' spread their message. *See. e.g.*, Affidavit of Gregory Scharf at ¶ 4. Denying plaintiffs the ability to cover the costs of their T-shirts would significantly burden their ability to communicate their message.

The Supreme Court recently recognized that prohibiting "speakers" from receiving compensation for their speech can severely burden a speaker's ability to speak. In *United States v. National Treasury Employees Union*, the Court struck down a federal law, § 501(b) of Ethics in Government Act, that prohibited federal employees from

receiving compensation for speeches or articles. 115 S.Ct. 1003 (1995). That statute, like the regulation here, did not ban any expressive activity, it merely forbid the speaker or writer's receiving money for the activity. The Court found that

> [a]lthough § 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. *See Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Board*, 502 US 105, 112 S.Ct. 501 (1991). *Minneapolis Star & Tribune, Co. v. Minnesota Commissioner of Revenue*, 460 US 575, (1983); *see also Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987). Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.

Id. at 1014. A total ban on plaintiffs' selling message-bearing T-shirts is such a burden on their ability to spread their message that it violates their First Amendment right to freedom of speech.

V. Narrow Tailoring

The government has an undeniable interest in preventing excessive commercialism and a flea market atmosphere on the Mall. *See Iskcon*, 93-5301. The Court can only determine whether the means chosen to achieve the government's interest is narrowly tailored by considering

the particular site involved. *See United States v. Doe*, 968 F.2d at 90. Under this analysis, the sales ban is narrowly tailored in many areas of the Mall such as near the monuments where the preservation of a non-commercial atmosphere around the national monuments is a significant interest. But in other areas of the Mall and in other areas of the National Capital Parks, the ban is broader than necessary to achieve the government's interests. In addition, the regulation is not narrowly tailored because it fails to take into account the dramatic differences between the areas surrounding the monuments on the one hand and parks such as Dupont Circle on the other hand. *See Washington Free Community, Inc. v. Wilson*, 334 F. Supp. 77, 82 (D.D.C. 1971) (Corcoran, J.).

It is undisputed that there are permanent commercial stands on the Mall, where film, food, drinks and souvenirs are sold. AR at K. During the summer months, the Parks Service also allows fourteen mobile food vendors to roam the Mall selling ice cream and other food items. *Id.* The existence of licensed commercial activity like ice cream vendors on the Mall, which is not protected by the First Amendment, undercuts the government's claim that banning a significant amount of First Amendment activity throughout the *entire* Mall, and all the National Capital Parks, is narrowly tailored. *See United States v. Doe*, 968 F.2d at 90; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. at 531-32 (Brennan, J., concurring in judgment). The Parks department cannot claim that the sales ban is narrowly tailored to promote the government's interest in avoiding "discordant commercialism" in areas that are far away from monuments and next to stands where vendors

peddle hot dogs and film.[10] *See Van Allsburg v. City of Kansas City*, 600 F. Supp. 1226, 1233 (W.D. Mo. 1984) ("If having a vendor sell recreation-related articles purely for personal profit is allowed under the present policies as not unduly commercializing the parks, the Court is convinced that the nature, function, order, and beauty of the parks can be preserved by restrictions significantly less onerous than a total ban on fundraising."); *see also United States v. Doe*, 968 F.2d at 90-91.

The government argues that it would be too difficult and complicated to determine how to regulate the numbers of vendors or how to restrict vendors to certain areas of the Mall. It claims that it has no choice but to enact a total ban. This argument is not sustainable. The government concedes that it is able to regulate commercial activity on the Mall that is not protected by the First Amendment. AR at K. There are numerous "content-neutral" ways to restrict the number and/or placement of vendors. Administrative convenience is not a justification for significant restrictions on First Amendment activity.

---

[10] While the *Iskcon* panel considered the government's interest in avoiding excessive commercialism it did not specifically address whether the application of the sales ban was narrowly tailored in areas in which the government licenses concessionaires who are indisputably both commercial in nature and engaging in activities not within the ambit of the First Amendment. Nor did the *Iskcon* panel consider the application of the sales regulations to Parks such as Dupont Circle, which is in the center of one of the prime commercial areas in the District.

The government's successful management of other commercial vendors belies its claim that it cannot regulate non profit groups selling T-Shirts.

This Court's role is only to rule on the Constitutionality of the regulations, not to attempt to redraft them. *See White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984). This Court recognizes that the Constitution does not give people the right to set up commercial establishments on anyone else's land, including the government's. Plaintiffs' First Amendment rights do *not* extend to taking significant parts of the Mall out of public use by indiscriminately setting up "shops" from which to sell their wares.

The government has available to it a number of possible narrowly tailored means to fulfill the public interest within the constraints of the First Amendment. The Parks Service does regulate the placement and numbers of commercial vendors on the Mall, and it could so regulate the placement and/or number of T-Shirt vendors in a way that is narrowly tailored and leaves open ample alternative means for groups to enjoy the guarantees of the First Amendment. In regulating this activity, the government must appropriately balance the First Amendment interests of groups like the plaintiffs with the public interest in preventing discordant commercialism so that all can enjoy these magnificent park lands.

The Court is not unaware that T-Shirts have been criticized as "cheap, cheesy and commercial". But the message bearing T-Shirt is also a tribute to the creative spirit of poorly funded but inventive activists of every political persuasion who have discovered the expressive

power and appeal of making an item of clothing serve also as a means of communication. We must not forget that the First Amendment protects the ability of speakers to get their message across even when the majority might find the message or the means by which it is spread objectionable. *Cf. Cohen v. California,* 403 U.S. 15 (1971).

VI. The Government's Other Asserted Justifications for the Ban.

The government claims that its interest in crime prevention – eliminating the temptation to rob vendors and preventing the occasional fights among vendors competing for prime locations – justifies the sales ban. The First Amendment requires that the government protect those engaged in First Amendment activity rather than banning the activity as a means to protect the "speaker." *See. e.g. Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia,* 751 F.Supp. 218 (D.D.C. 1990), *aff'd,* 972 F.2d 365 (D.C. Cir. 1992) (government's duty is to protect persons exercising First Amendment rights, not to forbid them from demonstrating as a means to protect them). Even if there have been a few instances of vendors engaging in spirited disputes among themselves, that would not justify the sales regulation any more than instances of anti-competitive behavior in the newspaper business would justify a ban on the sale of newspapers. *See Turner Broadcasting System, Inc. v. FCC,* 114 S.Ct at 2479 ("If the government wants to avoid littering, it may ban littering, but it may not ban all leafletting. . . . 'Broad

prophylactic rules in the area of free expression are suspect.' ") (O'Connor, J., concurring in part, dissenting in part)

Here, the government must enforce its laws against robbery and assault rather than banning activities within the scope of the First Amendment.

The government has a significant interest in protecting unimpeded views of the monuments on the Mall. *See White House Vigil v. Clark*, 746 F.2d 1518, 1522 (D.C. Cir. 1984). This interest must be discharged without unduly affecting the First Amendment rights of citizens. Government imposed restrictions on speech may "eliminate[ ] no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). By banning the sales of T-Shirts outright throughout the entire Mall, the government has employed a cleaver where a scalpel would suffice. There are many parts of the Mall where the presence of vendors would not interfere with the sight lines to the monuments and a visitor's ability to photograph our magnificent monuments without vendors in the photo. Because the regulation eliminates far more than the activity that impairs the view of the monuments, the government cannot justify the regulation on these grounds. *See Iskcon*, 93-5301 at 11-12 (Government interest in preventing "ills associated with runaway solicitation" does not justify sweeping ban on in-person solicitation throughout the Mall.)[11]

---

[11] In addition, although there are no monuments in Rock Creek Park or Dupont Circle, the sales ban applies there. *See Washington Free Community*, 334 F. Supp. at 82.

The Government contends that its regulation is necessary to reduce "increasing pedestrian congestion." The government has not provided an adequate record to demonstrate the precise nature of the congestion, or, if such a problem exists, that the sale of T-shirts *is* a significant cause of the congestion sufficient to warrant the outright ban of such activity. The burden is on the government to demonstrate the significance of its interest, and that its regulations are narrowly tailored to serve that interest. *See. e.g., United States v. Doe*, 968 F.2d at 88. In this case, the government has failed to meet its burden; it has simply "posit[ed] the existence of [a] disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985). But the government must do more than that. At a minimum, the record must pinpoint the site(s) of the pedestrian congestion, how substantial it is, how it compares to the congestion caused by other activities, such as the myriad of softball games that crowd the Mall in the summer, and what alternatives outside of an outright ban on sales were considered to address the problem.[12]

This Court must grant significant deference to the judgment of the Parks Service on the best way to discharge its important obligations. *See White House Vigil v. Clark*, 746 F.2d at 1529. The government must develop an adequate record to justify its action. In the First Amendment context deference does not mean that the Court abdicates its role to form "an independent judgment of

---

[12] The government did set forth in the record some of the alternatives that it considered.

the facts." *Turner Broadcasting*, 114 S.Ct. at 2471.[13] Even Congress, which is entitled to the highest degree of deference, *see id.*, must justify First Amendment restrictions under intermediate scrutiny. *Id.* at 2471-72 (Congress must draw reasonable inferences "based on substantial evidence.") Where, as here, the government simply states there is a problem with pedestrian traffic, and puts little more in the record to support its claim, it has not met its burden of justifying the regulation. *See id.*

It is undisputed that the government has a significant interest in managing the National Capital parklands to prevent the destruction or deterioration of trees, shrubs and grass. *See Clark*, 468 U.S. at 296 (The government has a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition.") Although the government explained that damage to the grounds has occurred, AR at E, it has not set forth the extent of the damage. Nor has it distinguished between the damage to the Parkland caused by use of certain areas as softball diamonds,[14] with that caused by vendors selling T-shirts.[15]

---

[13] Judicial oversight of an administrative agency regulation that restricts activities protected by the First Amendment is "not a *Chevron [U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)] situation where administrative discretion is at its zenith." *United States v. Doe*, 968 F.2d at 90.

[14] Numerous large, hardened, grassless patches appear throughout the Mall caused by regular use as softball diamonds.

[15] A content-neutral time, place or manner restriction need not be the least restrictive alternative. *See Ward*, 491 U.S. at 797-98. "But if there are numerous and obvious less-burdensome alternatives to the restriction on speech, that is

VII. Conclusion

While the First Amendment does not prohibit the government from regulating the sale of message-bearing T-shirts on National Parklands, an outright ban on such sales does violate the First Amendment.

For the reasons set forth above, summary judgment will be granted for the plaintiffs. An appropriate order accompanies this opinion.

DATE: 9/12/95

/s/ Stanley Sporkin
Stanley Sporkin
United States District Court

---

certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable." *Discovery Network*, 113 S.Ct. at 1510 n13.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE VIETNAM VETERANS MEMORIAL, *et al.*	)	
Plaintiffs,	)	Civil Action
v.	)	No. 95-808
ROGER G. KENNEDY, *et al.*	)	(Stanley Sporkin)
Defendants.	)	

ORDER

(Filed Sep. 12, 1995)

The Court having ruled in the accompanying opinion that Defendants' enactment of a total ban on the sale of message-bearing T-shirts is a violation of the First Amendment, it is hereby

ORDERED that the regulation (36 C.F.R. § 7.96 (k)(2)) is declared invalid as it applies to message-bearing T-Shirts. Because Defendants may regulate the appropriate time, place and manner in which message-bearing T-shirts may be sold, the Court will allow the Defendants a reasonable period of time to issue temporary regulations, pending the adoption of a new permanent regulation, and

IT IS FURTHER ORDERED that the status quo will remain in effect pending the adoption of the temporary regulation, and

IT IS FURTHER ORDERED that pending further Government action, to the extent that additional relief is

needed by either the Plaintiffs or by the Defendants, the Court will entertain appropriate requests.

DATE: 9/12/95

/s/ Stanley Sporkin
Stanley Sporkin
United States
District Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5393 **September Term, 1996**
95cv00808

Friends of the
Vietnam Veterans Memorial, et al.,
Appellees

v.

Roger G. Kennedy, Director,
National Park Service,
et al.,

Appellants

BEFORE: Silberman, Randolph and Rogers, Circuit Judges

ORDER

(Filed Aug. 8, 1997)

Upon consideration of appellees' petition for rehearing filed July 21, 1997, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5393 **September Term, 1996**
95cv00808

Friends of the
Vietnam Veterans Memorial, et al.,
Appellees

v.

Roger G. Kennedy, Director,
National Park Service,
et al.,

Appellants

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed Aug. 8, 1997)

Upon consideration of appellees' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5393 **September Term, 1996**
95cv00808

Friends of the
Vietnam Veterans Memorial,
et al.,

Appellees

v.

Roger G. Kennedy, Director,
National Park Service,
et al.,

Appellants

BEFORE: Silberman, Randolph and Rogers, Circuit Judges

ORDER

(Filed Sep. 2, 1997)

Upon consideration of appellees' motion for stay of mandate, the response thereto and of the reply, it is

ORDERED that appellees' motion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk